



**Gazebo Industries Limited v Rift Valley Railways (K) Limited & 2 others (Civil Case 271 of 2017) [2022] KEHC 13522 (KLR) (Commercial and Tax) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13522 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 271 OF 2017  
A MSHILA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**GAZEBO INDUSTRIES LIMITED ..... APPLICANT**

**AND**

**RIFT VALLEY RAILWAYS (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**EAST AFRICAN RAIL AND HANDLING LOGISTICS  
LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Background**

1. The notice of motion dated February 4, 2022 was brought under article 159 of the *Constitution of Kenya*, section 1A & 1B of the *Civil Procedure Act* and order 8 of the *Civil Procedure Rules*. The application was supported by the sworn affidavit of Gurson Singh Bharara and the applicant sought the following orders;
  - a. The court to grant leave to the applicant to amend its notice of motion application dated July 5, 2019 to amend prayer 4 to adequately provide for a finding on contempt, to delete prayer 5 and to include new prayers reflected at prayer 5A & 5B of the amended notice of motion.
  - b. The annexed amended notice of motion be deemed duly filed and served.
  - c. The costs of this application be provided for.



### **Applicant's Case**

2. The applicant stated that from the court sanctioned joint inspections conducted on 16<sup>th</sup> to January 18, 2019 and on 5<sup>th</sup> and November 6, 2019, there is a clear reduction in number of the said supplied goods in custody of the 3<sup>rd</sup> defendants from the number of goods originally supplied.
3. The prayers in the notice of motion dated July 5, 2019 do not include a prayer allowing for attachment against the 3<sup>rd</sup> respondent for enforcement of the value of the decretal sum.
4. The order of the court given on May 8, 2018 was addressed to inter alia the 3<sup>rd</sup> Respondent. Further, the said Application does not provide for personal responsibility in case of contempt for the 3<sup>rd</sup> respondent's managing director, who is now included as the 4<sup>th</sup> respondent.
5. The purpose of the amendment is to help the court in determining the real question in controversy between the parties and to reflect the correct position.

### **Respondent's Case**

6. In response to the application, the respondent stated that the proposed amendment of prayer 5 of the application dated July 5, 2019, will completely change the character of the suit herein as the same amendment seeks to clandestinely introduce an order to attach properties of the Kenya Railways Corporation in settlement of the decretal sums herein when the said judgment as issued was against the defendant Rift Valley Railways Ltd and the Kenya Railways Corporation was never privy to the contractual relationship between the two parties and the transaction the subject of these proceedings.
7. The orders in the proposed amendment cannot issue as Kenya Railways Corporation is not a party to these proceedings and an order cannot be issued for attachment of its assets in a purported settlement of a judgment against a third party which it has no relationship with.
8. The proposed amendment is a disguised attempt by the plaintiff to release the defendant from its contractual obligations by purporting to have the court hold the Kenya Railways Corporation responsible for a transaction it is a complete stranger to simply because the Corporation is public body.

### **Issues for Determination**

9. The court has considered the application and there is only one issue for determination;
  - a. Whether the applicant should be allowed to amend the notice of motion dated July 5, 2019?

### **Analysis**

10. The issue for determination as far as this application is concerned is whether the applicant's notice of motion for amendment has merit and ought to be entertained. The general power of the court to amend pleadings draws from section 100 of the *Civil Procedure Act*. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judicially and in line with criteria set out under order 8 rule 3 of the *Civil Procedure Rules*.
11. Order 8 rules 3 of the *Civil Procedure Rules* stipulates as follows: -

- “ (3) Subject to order 1, rules 9 and 10, order 24, rules 3, 4, 5 and 6 and the following
  - (1) provisions of this rule, the court may at any stage of the proceedings, on such



terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

3(5) An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

12. However, order 8, rule 3 is not applicable herein to the extent that it only provides for amendment of pleadings. A notice of motion, which is what the applicant seeks leave to amend, is not a pleading under section 2 of the [Civil Procedure Act](#) which defines a pleading to include:

“A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

13. However, the amendment sought can be considered under section 100 of the [Civil Procedure Act](#) which provides for the general power to amend and order 8 rule 5 of the [Civil Procedure Rules](#). Section 100 provides that:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

14. Order 8, rule 5(1) & (2) of the [Civil Procedure Rules](#) on the other hand states:

“(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order.”

15. The principles upon which a court acts in an application to amend a pleading before/during trial are also well settled and succinctly stated in [Eastern Bakery v. Castelino](#), (1958) E.A.461 (U.) at p.462:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.

16. The same was later buttressed by Bramwell, LJ in [Tildesley v Harper](#) (1878), 10 ChD at p296 stated as under:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.”



17. The applicant sought leave to amend the notice of motion to include a prayer allowing for attachment against the 3<sup>rd</sup> respondent for enforcement of the value of the decretal sum given that the order of the court given on May 8, 2018 was addressed to *inter alia* the 3<sup>rd</sup> respondent. It was argued that the amendment will help in determining the issues in controversy.
18. The respondents objected to the applicant's application and stated that whereas the plaintiff sought orders against Kenya Railways Corporation, it has failed and/or refused to properly join Kenya Railways Corporation to these proceedings with the result that no orders can lawfully issue against Kenya Railways Corporation in these proceedings as currently filed.
19. At this stage this court will not delve into the merits of the amended application but for the purpose of determining the real question in controversy between the parties, this court will allow the applicant the chance to amend its application. It is also notable that the respondents have not shown any prejudice they are likely to suffer if the court allows the application for amendment.

### **Findings and Determination**

20. In light of the forgoing reasons, this court finds that the application to amend the notice of motion has merit and it is hereby allowed.
21. The applicant to file and serve the amended application upon the respondents within seven (7) days. The Respondents to file responses within seven (7) days of service;
22. The respondents shall have costs of this application assessed at Kshs 20,000 payable to the advocates for the Kenya Railways Corporation. Payable before the next mention date.
23. Mention on October 19, 2022 for compliance and directions.

Orders accordingly

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

**HON. A. MSHILA**

**JUDGE**

**In the presence of;**

Agwara for the Kenya Railways Corporation

Mathew Muoki holding brief for Kanjama for the Applicant

Lucy-----Court Assistant

